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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5284

DOUGLAS RAYMOND DORSZYNSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 484 F. 2d 849.

JURISDICTION

The judgment of the court of appeals (A. 55) was entered on July 20, 1973. The petition for a writ of certiorari was filed on August 16, 1973, and was granted on December 10, 1973. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a convicted youth offender may be sentenced under applicable penalty provisions other than the Federal Youth Corrections Act without explicit

findings by the district court, together with a detailed statement of reasons in support thereof, that the defendant will not benefit from treatment as a youth offender under the Youth Corrections Act, 18 U.S.C. 5010.

STATUTES INVOLVED

Relevant provisions of the Federal Youth Corrections Act (18 U.S.C. 5005 *et seq.*) are as follows:

> 5006. *Definitions.*
>
> * * * * *
>
> (e) "Youth offender" means a person under the age of twenty-two years at the time of conviction.
>
> 5010. *Sentence.*
>
> (a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.
>
> (b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or
>
> (c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of

imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings.

5017. *Release of Youth Offenders.*

* * * * *

(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

(d) A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed

by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction.

STATEMENT

1. Petitioner's counsel informed the United States District Court for the Eastern District of Wisconsin that petitioner, who was nineteen years old, intended to plead guilty to the pending charge against him of possessing a controlled substance (L.S.D.), in violation of 21 U.S.C. 844, and requested that a presentence investigation be completed prior to the plea. See Rule 32, Fed. R. Crim. P. At a hearing prior to petitioner's plea, government counsel told the court that the maximum penalty for the violation was one year's imprisonment and a fine of $5,000, or both, and that petitioner might be subject to the Youth Corrections Act (A. 6). Petitioner stated to the court that he understood that this was the maximum penalty for his offense (A. 7). He also stated that no one had pressured him to plead guilty (A. 7–8) and that he did not believe any arrangement had been made regarding his sentence (A. 8).

After considering the presentence report and petitioner's argument that he should be placed on probation under the Youth Corrections Act (see 18 U.S.C. 5010(a)) (A. 11–13), the court sentenced petitioner to the custody of the Attorney General for one year. It ordered ninety days of the sentence to be served in a jail-type institution and suspended the execution of

the remainder, but placed petitioner on probation for two years upon his release from custody (A. 13–14). See 18 U.S.C. 3651.

Thereafter, petitioner moved the district court for withdrawal of his guilty plea, reduction of sentence, and release from custody under Rules 32(d) and 35, Fed. R. Crim. P., and 28 U.S.C. 2255 (A. 17–18). He argued, *inter alia,* that because the court, in alleged violation of the Youth Corrections Act (18 U.S.C. 5010(d)), had made no finding that petitioner would not derive benefit from treatment under that Act, it lacked jurisdiction to sentence him under other penalty provisions. At the same time he argued that his plea had been entered in violation of Rule 11, Fed. R. Crim. P., because he had not been advised that he was subjecting himself to incarceration for up to six years under the Youth Corrections Act (A. 17–18).

After a hearing, the district court denied petitioner's motion (A. 44). The court also ruled that it was not required to enter any specific finding that petitioner would not derive benefit from treatment under the Youth Corrections Act prior to sentencing him under other penalty provisions, and stated that in imposing sentence the court had "impliedly" held that youth offender treatment was not appropriate (A. 44–45).[1]

[1] The district court also denied petitioner's Section 2255 motion for release from custody based on the claim that his guilty plea had been induced by promises and coercion of an agent of the Bureau of Narcotics and Dangerous Drugs (A. 46). Moreover, the court revoked petitioner's probation on the ground that he had lied about the agent's promise. The court of appeals thereafter reversed and vacated the district court's summary revocation of probation, and that issue is not before this Court.

2. The court of appeals affirmed the district court's holding that Section 5010(d) of the Youth Corrections Act does not require explicit findings that a youth offender will not derive benefit from treatment under Sections 5010 (b) or (c) prior to sentencing under other applicable penalty provisions (A. 58):

> The legislative history of the Youth Corrections Act establishes that a purpose of the Act was to make available a system for the sentencing and treatment of youths to be used in the judge's discretion. See 1950 U.S. Code Cong. Service, p. 3983. It was designed to provide an alternative to sentencing as an adult under the Criminal Code.
>
> The record here supports the implication that after the petitioner's trial counsel had raised the possibility of sentencing the petitioner as a youth offender, the trial court determined that the petitioner would not derive benefit from treatment pursuant to section 5010 (b) or (c). Insofar as [*United States* v.] *Waters* [437 F. 2d 722, 725 (C.A.D.C.)] requires that the trial judge make an explicit finding to that effect, we decline to follow it.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. *The Structure of the Act.* The Youth Corrections Act of 1950 (18 U.S.C. 5005 *et seq.*, hereinafter referred to as the "YCA" or the "Act"), created a flexible new set of discretionary sentencing options to be used by district courts, in which particular emphasis is placed on rehabilitative treatment of "youth offenders"—*i.e.*, defendants under the age of

twenty-two at conviction (18 U.S.C. 5006(e))[2]—in cases where the trial court is of the view that the defendant would benefit from such treatment as opposed to sentencing under other applicable penalty provisions.

The Act defines "treatment" as meaning "corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders" (18 U.S.C. 5006(g)) and provides that youth offenders committed under the Act "shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment." 18 U.S.C. 5011. Such institutions are to be used, in so far as practical, only for treatment of committed youth offenders, who are to be segregated from other offenders and grouped among themselves by classes according to their needs. *Ibid.*[3]

The Act created a Youth Corrections Division in the Board of Parole and gave the Division responsibility, *inter alia*, for ordering the conditional release and the unconditional discharge of committed youth offenders,

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[2] Youths under eighteen are usually subject to the Federal Juvenile Delinquency Act, 18 U.S.C. 5031–5037. The decision to proceed under these provisions is entrusted to the discretion of the Attorney General. 18 U.S.C. 5032. See p. 60, *infra*, n. 55. Since 1958, a "young adult offender" (*i.e.*, a defendant between the ages of 22 and 26) may be sentenced under the Youth Corrections Act if the court finds reasonable grounds to believe that he would benefit by the treatment authorized by that Act. 18 U.S.C. 4209.

[3] The Act provided that no youth offender shall be committed under the Act "until the Director shall certify that

(Continued)

and for advising the Director of the Bureau of Prisons as to general treatment and correction policies for such offenders. 18 U.S.C. 5005, 5007.

The decision to subject a youth offender to treatment under the Act is vested in the sentencing judge. Section 5010, the interpretation of which is at the heart of the instant case, makes available to the judge three sentencing options in addition to the choices existing under other applicable penalty provisions. The Act permits probation (Section 5010(a)) and offers two treatment alternatives to a sentencing judge. Under Sections 5010(b) and 5017, the judge may sentence the defendant for treatment and supervision of indeterminate duration up to six years from the date of conviction, the defendant being entitled to conditional release under supervision after no more than four years and to unconditional discharge at the end of six years. Alternatively, under Sections 5010(c) and 5017, a judge who is of the view that the defendant "may not be able to derive maximum benefit

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(Continued)

proper and adequate treatment and facilities and personnel have been provided." 18 U.S.C. 5012. We are informed by the Bureau of Prisons that in the 1950's two general certifications were made covering district courts in all circuits except the District of Columbia Circuit. (The administration of the treatment provisions of the Act as to District of Columbia offenders is split between the District Government and the Bureau of Prisons. 18 U.S.C. 5025.) It has been held that such general certifications were all that the Act contemplated, and that Section 5012 does not require certifications on a case-by-case basis. *Robinson* v. *United States*, 474 F. 2d 1085, 1090–1091 (C.A. 10). Compare *United States* v. *Alsbrook*, 336 F. Supp. 973 (D.D.C.) (requiring certification on case-by-case basis), with *United States* v. *Lowery*, 335 F. Supp. 519 (D.D.C.) (certification not required for commitment).

from treatment" within six years from conviction may sentence the defendant for treatment for any period authorized by law for the offense in question—the defendant then being entitled to conditional release two years prior to the expiration of the term imposed and to unconditional discharge at the end of that term. Under both alternatives, the Youth Division of the Bureau of Prisons may conditionally release a defendant at any time and may unconditionally discharge the defendant one year after conditional release. 18 U.S.C. 5017 (a), (b).[4]

In the event of unconditional discharge by the Division before the expiration of the maximum sentence imposed, or discharge from probation by the court before the end of the maximum period thereof, the conviction is automatically set aside and the offender is entitled to a certificate to that effect. 18 U.S.C. 5021.

In addition, Section 5010(e) permits the court, if it "desires additional information as to whether a youth offender will derive benefit from treatment" under Section 5010(b) or (c), to order the offender committed to the custody of the Attorney General for observation and study by the Division for up to 60 days, or for such additional period as the court may direct.

In lieu of the foregoing treatment, Section 5010(d) provides that the district court may sentence the offender under any other applicable penalty provi-

[4] At any time before unconditional discharge, the Division may require an offender to be returned to custody if it is of the view that he will be benefited by further treatment. 18 U.S.C. 5020.

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sion [5] "[i]f the court shall find that the youth offender will not derive benefit from" the kind of treatment authorized under Section 5010(b) or (c).

The Act provides, moreover, that nothing in it was to "limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation," nor was it to be construed in any way to amend, repeal, or affect the provisions of 18 U.S.C. 3651, *et seq.*, concerning probation. 18 U.S.C. 5023(a).[6]

2. *Summary of Argument.* The Act was a product of the efforts of a committee of the Judicial Conference, which issued a report in 1942 proposing the establishment of a special correctional and rehabilitational system to be available for sentencing young persons convicted of federal crimes. Hearings were held by Congress on the Judicial Conference proposal in 1943 and again in 1949, and the Act as adopted in 1950 was substantially that recommended by the judges. It was adopted at a time when the discretion

[5] Other such alternatives include a straight adult sentence; a prescribed period of probation which may be preceded by up to six months' confinement (18 U.S.C. 3651); imprisonment for more than one year with specification of early eligibility for parole (18 U.S.C. 4208(a)); rehabilitation of narcotics addicts through treatment for drug dependency (18 U.S.C. 4251, *et seq.*); probation, withholding of judgment of conviction, and expungement of all records for simple drug possession charges (21 U.S.C. 844(b)). (Petitioner, who was convicted of a violation of 21 U.S.C. 844(a), was apparently eligible for consideration for this latter form of sentence, but it does not appear that it was requested on his behalf, and the record reflects no consideration of the possibility of a Section 844(b) sentence).

[6] Section 5023(b) makes similar provision with respect to the Federal Juvenile Delinquency Act, 18 U.S.C. 5031, *et seq.*

of federal trial judges in the area of sentencing criminal defendants was essentially unfettered and unquestioned (see *e.g., Williams* v. *New York,* 337 U.S. 241), and the legislative history abounds with statements by its principal congressional sponsor, Senator Kilgore, and by the judges and other representatives of the legal community who testified in support of the YCA, affirming the intention of the legislation simply to create an alternative mode of corrections for youth offenders, the use of which would be entirely optional with the sentencing judge. Not only was the election to use YCA sentencing to be entirely discretionary with the sentencing judge, but we have found no evidence in the legislative history suggesting an intent to impose specific procedural requirements for express findings or statements of reasons in connection with the exercise of that discretion—requirements so radical in light of traditional sentencing practices at the time that they surely would not have been adopted by Congress without a word to that effect in either the history or the language of the Act.

The language of Section 5010 confirms the intent of Congress to provide an optional alternative system of treatment for youth offenders without infringing in any way upon the traditional discretion of sentencing judges. This is demonstrated by the constant reiteration of the word "may" in describing the judge's power to impose each of the types of sentence permissible for a youth offender (probation; treatment for an indefinite period not to exceed six years; treatment for an indefinite period with a maximum incarceration of longer than six years; use of any other

applicable penalty provision). In no instance does the Act direct the judge to use any particuliar dispositional option.

The contrary reading of the District of Columbia and Second Circuits—that the Act *mandates* treatment under its provisions rather than imposition of an adult sentence whenever there is any prospect that treatment under the Act might assist to some extent in the rehabilitation of the youth offender—demonstrably thwarts the intention of the sponsors of the legislation. Moreover, the holding that the sentencing court "may" choose between treatment under the Act and use of other penalty provisions *only* in the case of offenders who it *already has determined will definitely not be helped by YCA treatment* assigns an absurd meaning to the language of Section 5010(d).

The foregoing observations in no way detract from the conclusion that, in adopting the Act, Congress was establishing a policy favoring greater emphasis on the use of specialized treatment to achieve the goal of rehabilitation in the case of youth offenders. However, the stress placed on the recognition of that policy and the fact that Congress sought in the Act to create a comprehensive alternative system of corrections for offenders sentenced to treatment thereunder (*e.g., Amici* Br. 7–8) simply begs the question that is at the heart of the present spate of YCA litigation—whether Congress implemented this policy by rigidly confining the traditional discretion of the sentencing judge and, if so, whether various procedures not expressly required by the Act should be imposed on the process of sentencing youth offenders in order

to insure faithful compliance by the sentencing judges with the Act's perceived mandate.

We submit that Congress did not so limit traditional sentencing discretion, that it did not deprive the judge of the flexibility to select the sentencing disposition that he concluded would be most advantageous to the interests of the offender and of society, and that it did not demand an undeviating focus on rehabilitation to the exclusion of other traditional sentencing considerations such as deterrence, protection of society, and punishment.

As a consequence of their erroneous premises as to the substantive content of the YCA, the District of Columbia and Second Circuits have held that, before a youth offender may be sentenced under any other applicable penalty provision, the Act imposes on the usual sentencing process an elaborate procedural structure involving (1) explicit findings under Section 5010(d) that the offender will not derive benefit from treatment under the Act; (2) a statement of reasons for such a finding; and (3) appellate review of those reasons to determine whether they are sufficient in light of what those courts have held to be the purpose of the Act.

The Act, however, does not purport to deal in any way with sentencing procedures (beyond providing district judges with an additional discretionary means of obtaining information concerning the appropriate sentence (Section 5010(e)). Congress clearly assumed that the sentencing decision was, as was then the uniform federal practice, being committed to the unreviewable discretion of the trial judge. Thus, the

entire focus of the legislative effort was directed to the development of a new, alternative correctional system for young offenders, with no intent to create, by implication, a radically new set of procedures for trial judges making sentencing decisions.

Neither the terms of the Act nor anything in its history requires that a judge, when sentencing a youth offender under other applicable penalty provisions, make such an explicit finding nor give a statement of reasons to support such a finding. Similarly, there is no basis in the Act or its history for concluding that Congress intended appellate courts to engage in any kind of judicial review of the determination of the district judge as to whether or not to sentence an offender to YCA treatment.

Requirements of explicit findings, reasons and review would have been contrary to well-established practice and precedent, and the wisdom of imposing such requirements is open to debate. The long-settled practices of not requiring judges to state reasons for the sentence they give, and of not permitting appellate review of a sentence that is within legal limits, both rest upon substantial policy grounds relating to the unique nature of the sentencing process. Congress has chosen not to alter those established practices except in very limited circumstances, where it has done so by explicit legislation. See, *e.g.*, 18 U.S.C. 3575(b), 3576, and 21 U.S.C. 849, providing for findings, reasons and appellate review in connection with a limited category of sentences. It cannot be assumed that Congress accomplished *sub silentio* in the Act

what it has elsewhere done explicitly. If the procedural requirements read into the Act by the District of Columbia Circuit, and the Second Circuit are desirable, it is for Congress, not the courts, to provide for them.

3. Although the constitutional claim discussed in petitioner's brief is not properly before the Court, not having been raised in the petition, we contend that there are no constitutional considerations that require or support the construction of the Act sought by petitioner and reflected in the court of appeals' decisions on which petitioner relies.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE YOUTH CORRECTIONS ACT CLEARLY DEMONSTRATES THAT CONGRESS INTENDED DISPOSITION OF CONVICTED YOUTH OFFENDERS TO REMAIN WHOLLY WITHIN THE DISCRETION OF THE SENTENCING JUDGE

The legislative history of the YCA makes it unmistakably clear that the Act was not intended to limit in any way the traditionally broad discretion vested in sentencing judges. While required to sentence within the limits of the applicable sentencing alternatives, a judge is not required by the Act to impose any particular sentence in a given case.

The Act had its origins in a report of the Judicial Conference of the United States in 1942, which recommended enactment of provisions concerning sentencing and correction of both youth offenders and adults that had been drafted by a committee of federal

judges. Hearings were held on this proposal in 1943,[7] but no legislation resulted. Therefafter, in the 81st Congress, hearings were held in the Senate on a slightly revised version of the prior Judicial Conference proposal, which by then dealt only with youth offenders. See Hearings Before a Subcommittee of the Senate Committee on the Judiciary, Correctional System for Youth Offenders, on S. 1114 and S. 2609, 81st Cong., 1st Sess. (hereinafter "*Senate Hearings*"). The Judicial Conference's proposal was enacted without material amendment as the Youth Corrections Act of 1950.

During the hearings, Judge Bolitha Laws, a member of the Judicial Conference committee, described the sentencing options provided by the bill as being not an "absolute mandate" but rather "purely optional with a judge as to whether this treatment is to be given * * *." *Senate Hearings* 10. He stated that the bill simply provided "new alternatives" and "in no way reduces the authority or interferes with the sentencing power of the judges." *Id.* at 13. A judge could use the treatment alternatives "if he finds it fit to do so * * *." *Id.* at 15. Use of the law would be "purely an optional situation," and a judge "who does not want to use the new provisions, except perhaps rarely, does not have to use them." *Ibid.* After receiving a report requested under Section 5010(e),

[7] Hearings on S. 895 Before a Subcommittee of the Senate Committee on the Judiciary, Federal Corrections Act, 78th Cong., 1st Sess.; Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary, Federal Corrections Act and Improvement in Parole, on H.R. 2139 and H.R. 2140, 78th Cong., 1st Sess.

"the judge may deal with the offender entirely as he sees fit." *Id.* at 18.[8]

Judge John J. Parker, who chaired the Judicial Conference committee, gave like testimony (*id.* at 43–44):

> [T]he act * * * does not interfere with the power of the judge even with respect to those offenders [covered by the bill], but gives him *merely an alternative method of treatment* of those people. That is to say, under this bill the judge may still admit the youthful offender to probation. There is nothing in the bill that prevents that. He may still give the youthful offender the punishment prescribed by existing statutes, there is nothing in the bill that prevents that. All that the bill does is to provide that if *in his judgment and discretion,* he thinks that offender before the court is one that can be treated with advantage under this bill, he

[8] Judge Laws also recollected that in his advocacy of the bill he had met opposition from some federal judges (*Senate Hearings* 20–21):

"When they get the presentation fully made to them, and once they realize it is entirely optional and that some of us are not the types of experts that can look across a table into a man's eyes and know what sentence to give him, they say under those circumstances that they do not mind, for those of us who are frail, having the study made for us as long as they themselves are not restricted.

* * * * *

"The way I want to argue this with my brethren who oppose it is: let me do it and let them go on in the way they do.

"When I put that up to them, they say, 'All right, Judge, as long as you do not harrass me.' I will say to them that my prophecy is that at the end of 10 years they will all be doing it, and perhaps they will be doing it at the end of 5 years."

can sentence him under this bill instead of under the existing law.

* * * * *

Mr. Chairman, that is roughly the provision of the act as I understand it. I do not see any possible objection to it. They say that there are some of these fellows that ought to be given serious punishment notwithstanding their being young and *it does not prevent their being given serious punishment*. Nothing prevents a man from getting 25 years punishment if he deserves it. Nothing prevents his being executed if he deserves such sentence.

On the other hand, there is nothing to prevent the judge from sentencing him to probation if he thinks that is to be done.

All it provides is that in the case of those who need treatment, in the opinion of the judge, the judge shall be able to give them that treatment, and reclaim them to society. [Emphasis supplied.]

Judge Parker further noted that the goal of rehabilitation was only one of the goals of the correctional system, other purposes being protection of society and satisfaction of the requirements of justice, and while reform may be the chief purpose in dealing with youth offenders, it was not the sole purpose. *Id.* at 48. He reiterated that "there are some of them that ought to be punished and there is nothing in the bill that prevents that." *Id.* at 49.

During a discussion of objections by federal judges to an earlier bill, Senator Kilgore, the sponsor of the

YCA, similarly noted that two judges "objected to taking sentencing away from the court and giving it to an executive agency. But that has been answered in S. 2609 because it takes nothing away," to which another member of the Judicial Conference committee, Judge Orie L. Phillips, responded: "That is correct; it is purely optional." *Id.* at 69.[9]

Judge Phillips also testified, in response to the comment that the age limit originally proposed (24) was too high, as follows (*id.* at 67):

> Judge PHILLIPS. It may seem offhand like a high age but age in years does not always mean age in fact. A 23-year-old may be as old as another 16-year-old in mental development. *The judge has absolute discretion* in determining how old a person he shall sentence under this act.
>
> In other words, putting the age limit up to where we have does not compel anybody to sentence them up to that age limit. However, if he finds that a boy of 22 or 23 is involved he can use the act. That is *merely a flexibility and it is not a command* that he send the boys up.
>
> Senator KILGORE. *I agree with you on that* but I wanted your reaction. [Emphasis supplied.]

[9] Judge Phillips confirmed the great extent of individual discretion afforded under the Act in discussing a pair of ostensibly identical offenders who had been sentenced, respectively, under the Act and under other provisions. Such disparities would be permissible, but "a considerable measure of uniformity of policy" would be obtained because the release of both would ultimately be in the hands of the Parole Board. *Id.* at 66.

Judge Carroll Hincks, another member of the committee, observed, with respect to judges who had said they would not want to use the proposed treatment alternatives: "Very well, they do not have to use it." *Id.* at 57.[10]

James V. Bennett, Director of the Bureau of Prisons, who worked closely with the committee of judges, testified "that far and away the largest number of young offenders who would come to us under the bill are automobile theft cases * * *." *Id.* at 29.[11] Most of those cases were said to involve boys who have "gone on a junket" and would not need to go to prison once they were returned to parental control, but without the

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[10] Similar comments had been made in the hearings in 1943 concerning the earlier proposals. See, *e.g.*, Hearings on Federal Corrections Act and Improvement in Parole, *supra*, at pp. 9, 32, 34–36.

[11] In addition to automobile larceny, the other principal categories of crimes committed by persons under twenty-four years old who were committed to federal institutions in fiscal year 1949 involved immigration, other larceny, narcotics, forgery and liquor; robbery convictions were among the least common, accounting for only 34 out of 4896 commitments. *Senate Hearings* 22–23; S. Rep. No. 1180, *supra*, at p. 7. Subsequent history has confirmed Mr. Bennett's prediction, for until quite recently defendants convicted for violation of the Dyer Act (18 U.S.C. 2312), constituted more than fifty percent of all offenders committed each year under the Youth Corrections Act:

alternatives provided by the Act, "the judge has no way to cope with the problem." *Ibid.*[12]

At the conclusion of the hearing, during a colloquy with Senator Kilgore, James E. Palmer, Jr., President of the Federal Bar Association, summed up the discretionary philosophy incorporated into the provisions for sentencing and administering the incarceration of youth offenders (*id.* at 82):

> [T]his bill, turns upon the caliber and efficiency of our judges, and also on the ability of the men in charge of the program set up under the bill.
>
> I have enough confidence in the discretion of our judges to feel that they are not going to

(Continued.)

Fiscal year	Dyer percent	Total YCA commitments	Number of YCA Dyer commitments
1973	11.6	1,451	168
1972	14.5	1,149	167
1971	22.6	1,108	251
1970	38.2	1,160	443
1969	42.0	1,318	554
1968	53.3	1,138	607
1967	55.0	1,264	733
1966	57.7	1,132	653
1965	60.6	1,131	686
1964	63.1	1,149	725
1963	61.4	1,237	759
1962	62.4	1,182	737
1961	63.8	1,324	845
1960	56.7	1,326	752
1959	60.7	1,291	784

Source: Bureau of Prisons Annual Reports.

[12] Mr. Bennett also testified that it was difficult to see how any judge "could rightfully object to the bill because they can use it or not, as they see fit, and yet it gives them all of these additional services and alternatives." *Senate Hearings* 25. The bill added "no complicated procedures. The judge would simply decide whether the offender was to be treated under the terms of this bill * * *." *Id.* at 30.

> abuse this statute, and certainly that those who are charged with the direction of these people are not going to abuse it to the extent that it will ever rebound that we are here trying to set up a structure that will give the Government a reputation dealing too lightly with those who should be dealt with properly.[13]

The comments of the judges and others at the Senate hearings (there were no House hearings) were reflected in the committee reports on the bill. Thus, the Senate report described the bill as providing "a new alternative sentencing and treatment procedure," which "would not deprive the court of any of its present functions as to sentencing * * *." S. Rep. No. 1180, *supra,* at p. 1. The bill was said to be "most flexible" (*id.* at 5), and the treatment it authorized was described as "another alternative" which the court could use, in addition to probation, the Juvenile Delinquency Act, and any applicable law relating to the offense. *Id.* at 2. The discretionary nature of the proposal was further indicated in references to Section 5010(e), under which, "*should the court desire* additional information * * * as to whether the youth

[13] See also Gottshall, *Sentencing the Youth and Young Adult Offender*, 26 Federal Probation Quarterly, No. 2, 17 at 21-22 (1962):

"Section 5010(d) confers no benefits under the Act. It is generally regarded as nothing more than an affirmative statement that the court, convinced that treatment under 5010(b) or 5010 (c) would accomplish no good, has resort to the penalty authorized for the substantive offense. Actually, inquiry among several who assisted in the drafting of the Act confirmed the view that the subsection was included to assure the courts that the regular sentencing provisions were available when they felt that correctional treatment under the Act was inappropriate."

offender would derive benefit from the treatment contemplated under the proposal, it *may* commit the youth * * * for observation and study * * *." (*Ibid*; emphasis supplied). The report also stated that "[j]udges must ever keep in mind the public safety * * *." *Id.* at 5.[14]

The House report similarly described the bill as being "designed to make available for the discretionary use of the Federal judges" an additional sentencing system "that will promote the rehabilitation of those [youth offenders] who in the opinion of the sentencing judge show promise of becoming useful citizens * * *." H. Rep. No. 2979, 81st Cong., 2d Sess., at p. 1. The new alternatives in the bill were said to look "primarily" to rehabilitation. *Id.* at 3.[15]

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[14] *Amici* (Br. 10) have stressed a passing comment in the Senate report, in the context of a discussion of the provision for pre-sentence study of the offender, that, after receiving the report under Section 5010(e), the judge may sentence the offender under any other applicable law if "the judge is convinced the youth is incorrigible and would derive no help from the program * * *." S. Rep. No. 1180, *supra*, at 5. When viewed in context however, it is evident that this language was not intended to indicate that the judge must sentence under the Act unless the defendant is incorrigible and would derive no help from treatment thereunder. Rather, the language is descriptive. Such an offender is doubtless the prototype of the defendant who Congress expected would not be sentenced under the Act, but there is no indication that the sentencing judge's discretion was to be confined exclusively to such offenders, and the text of Section 5010(d) cannot sensibly be read to compel such an interpretation (See pp. 32–35, *infra*).

[15] See also Letter to Representative Celler, Chairman of the Committee on the Judiciary, dated June 21, 1950, from Peyton Ford, Deputy Attorney General, H. Rep. No. 2979, *supra*, at p. 8.

During debate on the bill, Senator Kilgore, its sponsor, assured the Senate that it "does not take away from the court any of its powers, but does give to the judges * * * the right [to sentence under the Act] * * *." 95 Cong. Rec. 14889. He added that the system proposed "does not interfere with their handling of the criminal, but gives [judges] * * * an additional facility to aid in trying to straighten out the offender." *Id.* at 14890. He further explained that "[t]he bill will not be compulsory in any sense of the word * * *" (96 Cong. Rec. 1283) and that "use of the system prescribed by the bill will not be mandatory." *Id.* at 8267.[16]

Thus, the legislative history of the Act time and again reflects the intent of the judges who drafted and proposed it[17] and of the congressmen who enacted it to create a new system of treatment and rehabilitation to be available for *optional* use by federal district judges in the case of a particular class of eligible defendants. The traditional broad discretion of district judges in sentencing matters was to be fully as applicable to the sentencing of youth offenders as to other convicted defendants. Not only was the Act not meant to mandate any particular correctional mode for the individual youth offender

[16] We have found nothing in the brief House debates (96 Cong. Rec. 15034–15036) relevant to the issues in this case.

[17] While testimony of witnesses at congressional hearings is not always a reliable guide to legislative intent, the views of the judges who helped draft the Act—which was primarily the result of the efforts of the Judicial Conference and dealt with the powers of judges in a role traditionally assigned to their discretion—carry far greater weight than most testimony. Cf. *Zuber* v. *Allen*, 396 U.S. 168, 192.

(although, of course, it embodied a general policy favoring rehabilitative treatment for youth offenders likely to respond favorably to such treatment), but its history is devoid of evidence of affirmative congressional intention to impose particular procedural requirements on the exercise of the sentencing judge's discretion. This silence is significant evidence that Congress, legislating against a background of essentially unfettered sentencing discretion, had no intent to impose what would have been rather revolutionary requirements on sentencing judges to observe particular sentencing procedures such as the making of express findings or the articulation of reasons in support of the sentencing decision.

Indeed, the earlier history of the YCA proposal strongly suggests that Congress would have expressed specific procedural requirements in the Act had it intended them to apply. As noted earlier, the version of the Act considered by Congress in 1943 contained provisions relating to both youth and adult offenders. In the case of the latter category of offenders (including youth offenders being sentenced under adult provisions), a sentence of imprisonment for more than one year could not be imposed by the court without first obtaining a recommendation from a Division on Adult Corrections that was to be created under the bill (a mandatory referral provision comparable to the optional provision contained in YCA's Section 5010(e)). If the judge's sentence diverged from the recommendation of the Division, he would have been required to give a written explanation on the record of his reasons for imposing a different sentence. S. 895, 78th

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Cong., 1st Sess., Tit. II, § 1; see also H.R. 2140, 78th Cong., 1st Sess. The bills, which contained provisions substantially similar to present Section 5010(d), required no express findings or statement of reasons concerning the decision whether to sentence a youth offender under youth or adult sentencing provisions. See S. 895, *supra*, Tit. III, § 1(c).[18]

II. SECTION 5010 OF THE ACT DOES NOT IMPOSE MANDATORY SUBSTANTIVE STANDARDS OR REQUIRE ADHERENCE TO PARTICULAR PROCEDURES SUCH AS EXPRESS FINDINGS OR STATEMENTS OF REASONS IN THE SENTENCING OF YOUTH OFFENDERS

The question presented by the petition in this case is whether a district judge who declines to use the treatment alternatives authorized by the Act must accom-

[18] Moreover, even with respect to the requirement of a statement of reasons in connection with adult sentencing, there was to be "no review" under the bill, according to the chairman of the Judicial Conference committee, Judge John J. Parker. Hearings on S. 895, Before a Subcommittee of the Senate Committee on the Judiciary, Federal Corrections Act, 78th Cong., 1st Sess., at p. 6. The hearings revealed that some federal judges opposed the adult offender provisions as encroaching on the sentencing powers of federal judges (*e.g.*, Hearing on Federal Corrections Act, *supra*, at p. 14–15), and the controversial adult provisions were eliminated by the Judicial Conference committee before the legislation was resubmitted to the 81st Congress six years later. See *Senate Hearings* 9, 42–43.

As *Amici* note (Br. 14, n. 11), the abbreviated discussion of the 1943 proposal in our memorandum in response to the petition (p. 5, n. 5) may not have described the proposal with sufficient clarity. The requirement of a statement of reasons was not part of the youth offender provisions of the 1943 bills. The proposal is nevertheless relevant because it demonstrates that the draftsmen of the Act did, where such was their intent, require explicitly some of the procedural measures that petitioner and *Amici* contend are implicitly required by the Act.

pany the sentence imposed under otherwise applicable provisions with an explicit finding that the defendant "will not derive benefit" from such treatment and with a statement of supporting reasons for his determination. A negative answer to that question is required not only by the legislative history just examined but by a consideration of the nature of the substantive duty, if any, that the Act imposes upon a sentencing judge to use the alternatives provided thereby in particular cases. Thus, if the Court concludes, as we contend, that Congress did not limit the sentencing judge's usual discretion, and that the Act provides essentially an added dispositional alternative that the district court in its discretion may but need not use, then there is no basis for imposing the suggested procedural requirements.

On the other hand, if the Court were to agree with petitioner and the courts of appeals for the District of Columbia and Second Circuits that the sentencing judge is obliged to sentence a youth offender to treatment under the Act unless it can be said that the defendant is incorrigible and "will not derive benefit from treatment" (18 U.S.C. 5010(d)), the arguments in favor of an explicit finding, statement of reasons, and appellate review, required by those courts as necessary means of administering the Act, would be somewhat more persuasive, although not necessarily compelling.

A. THE ACT DOES NOT LIMIT THE JUDGE'S DISCRETION IN SENTENCING YOUTH OFFENDERS BY IMPOSING MANDATORY SUBSTANTIVE STANDARDS

Petitioner relies upon a line of decisions recently rendered by the Court of Appeals for the District of Columbia Circuit which have drastically altered the traditional functions of the district judge and the appellate court concerning the sentencing of youth offenders, most notably *United States* v. *Waters*, 437 F. 2d 722 (C.A.D.C.), and *United States* v. *Coefield*, 476 F. 2d 1152 (C.A.D.C.) (*en banc*). Taken together, *Waters* and *Coefield* read the Act as a rigid mandate to sentencing judges establishing a preferred ordering of sentencing options for youth offenders narrowly circumscribing their traditional discretion in imposing sentence. From that premise, *Waters* and *Coefield* hold in substance that a trial judge must sentence a youth offender to probation or treatment under the YCA except in the extraordinary case of a defendant who is so incorrigible that he will indisputably not derive any benefit whatever from rehabilitative treatment—*i.e.*, that it would be of "no value." *Waters, supra*, 437 F. 2d at 724–726; *Coefield, supra*, 476 F. 2d at 1154–1155; accord *United States* v. *Ward*, 454 F. 2d 992, 994 (C.A.D.C.).[19] In a subsequent decision applying *Coefield*, the court has said that a convicted youth offender has a "presumptive right" to YCA treatment.

[19] In *Cox* v. *United States*, 473 F. 2d 334, 337, 343–344 (C.A. 4) (*en banc*), certiorari denied, 414 U.S. 869, the Fourth Circuit expressed agreement with the *Waters* conclusion that the YCA imposes a preference for treatment to be imposed on all youth offenders unless the court affirmatively finds that the defendant will not benefit from it.

United States v. *Phillips*, 479 F. 2d 1200, 1205 (C.A.D.C.).

The *Coefield* interpretation of the Act was recently followed by the Second Circuit, which concluded that, in the YCA, "Congress, while carefully preserving judicial discretion, nevertheless *favored* treatment of youth offenders under the Act, *i.e.*, by way of rehabilitation." *United States* v. *Kaylor*, No. 73–1530 (C.A. 2), decided February 11, 1974 (*en banc*), slip op. 5709 (emphasis in original).[20]

In reaching these conclusions—supported here by petitioner (Br. 10) and *Amici* (Br. 4)—the courts have relied upon a selective and overly literal reading of the statute and have completely neglected the overwhelming legislative history discussed above, which demonstrates the entirely discretionary nature of the Act.

In enacting the YCA, Congress created new optional sentencing possibilities for youth offenders, under which rehabilitation was emphasized to a greater extent than under normal adult sentencing, although not to the total exclusion of other traditional considerations. See *Guidry* v. *United States*, 317 F. Supp. 1110, 1111–1112 (E.D. La.), affirmed, 433 F. 2d 968 (C.A. 5). By equipping the Bureau of Prisons with

[20] The filing of a petition for certiorari by the United States in *Kaylor* (*sub nom. United States* v. *Hopkins*) has been authorized, because of the possibility that, if the instant case is decided adversely to our position, this Court may nevertheless not reach several important questions regarding the duties of sentencing judges in youth offender cases reached in *Kaylor* but not necessarily essential to the disposition of the instant case.

the legal means to provide more refined and focused treatment and supervision than usual, and by authorizing indeterminate periods of custody that might be either shorter or longer than those permissible under a normal sentence, Congress may be said to have adopted in the YCA a general policy of facilitating and emphasizing treatment and rehabilitation of youth offenders in cases where the sentencing judge was of the view that the offender would benefit more from such treatment than from sentencing under other applicable penalty provisions.

The Act, however, consistent with the views of its sponsors, is entirely permissive and discretionary in its language. Section 5010 does not in terms require a judge to take any particular action in sentencing a youth offender. A judge who has doubts as to whether such rehabilitation could be accomplished within the period of treatment authorized under the Act has, in our view, discretion to decide whether YCA treatment is the most appropriate mode of disposition. Even when convinced that an offender would derive some rehabilitative benefit from YCA treatment, the judge is still free to determine that some other disposition will be more beneficial to the offender and to society, or is otherwise preferable. Nor is the judge required to consider only the question whether an offender might derive some rehabilitative benefit from such treatment, to the exclusion of all other factors normally considered in sentencing, such as deterrence, punishment and the protection of society. Cf. *Williams* v. *New York*, 337 U.S. 241, 248–249, n. 13. (See pp. 39–40, *infra*.)

In this connection it is important to recall that when Congress enacted the YCA the typical range of offenses committed by those potentially eligible for treatment under the Act was far more limited than is now the case. The District of Columbia was not originally covered by the Act and the principal category of offense committed by youths was interstate transportation of a stolen vehicle, frequently involving relatively minor episodes of "joy-riding." Relatively few serious offenses involving force and violence against the person, for example, were anticipated. See p. 20, n. 11, *supra,* and accompanying text.[21]

In short, such expectations as Congress may have had when considering the YCA as to the frequency with which treatment would be ordered (see *Amici* Br. 10–13) must be considered in relation to a more limited range of crimes likely to have been committed by those eligible for such treatment. In view of Congress' expressed concern for public safety (see p. 23, *supra*), it is fair to conclude that Congress was not barring a judge from considering traditional matters, in addition to potential rehabilitation, particularly when dealing with an offender guilty of an extremely serious or violent crime such as a murder, rape, assault and the like.[22]

[21] As originally adopted, the Act was not applicable in the District of Columbia. 64 Stat. 1089. It was amended in 1952 to apply to District of Columbia offenders. 66 Stat. 45; see 18 U.S.C. 5024–5025. In 1970, however, Congress excluded certain multiple offenders in the District of Columbia from eligibility for YCA treatment. See 22 D.C. Code 3202(d)(1).

[22] This is not to say, of course, that YCA treatment is never appropriate as to any particular category of offense, for, with one exception (22 D.C. Code 3202(d)(1)), Congress

(Continued)

1. *The Language of the Act Does Not Support the Coefield and Kaylor Decisions.*—Heavy reliance is placed on the language of Section 5010(d) for the proposition that the Act requires that any youth offender who is not clearly incorrigible must be sentenced to probation or treatment under YCA (Pet. Br. 10; *Amici* Br. 4; *Coefield, supra,* 476 F. 2d at 1154-1155; *Kaylor, supra,* slip op. at 5710). While we do not dispute that the Act reflects a congressional policy favoring the goal of rehabilitation and treatment under YCA in appropriate cases, a careful reading of the language of Section 5010 confirms the finding

(Continued.)
plainly has not placed any such limits on the Act's applicability.

Our understanding of the optional and discretionary nature of the YCA is confirmed by more than twenty years of experience under the Act—prior to the series of radical departures from past practice recently inaugurated by the Court of Appeals for the District of Columbia Circuit. Thus, over the past fifteen years, the numbers of offenders between 18 and 21 committed for treatment under the Act was always less than the number committed as adults:

Fiscal year	YCA percent	Total 18 to 21	YCA
1973	36.7	2,171	79[illegible]
1972	34.8	1,838	64[illegible]
1971	34.4	1,984	68[illegible]
1970	39.6	1,997	79[illegible]
1969	41.7	2,250	93[illegible]
1968	37.1	2,284	84[illegible]
1967	40.3	2,305	92[illegible]
1966	42.9	2,029	87[illegible]
1965	42.9	2,007	86[illegible]
1964	44.0	2,070	91[illegible]
1963	47.4	2,066	97[illegible]
1962	44.7	2,047	91[illegible]
1961	47.1	2,149	1,01[illegible]
1960	46.5	2,112	98[illegible]
1959	46.4	2,124	98[illegible]

Source: Bureau of Prisons Annual Reports.

from the legislative history that YCA sentencing was not meant to be required in any individual case. In all cases, the language of the statute leaves the sentencing decision to the traditional discretion of the district judge. Section 5010(d) provides:

> If the court shall find that the youth offender will not derive benefit from treatment under [the YCA] * * *, then the court *may* sentence the youth offender under any other applicable penalty provision [emphasis supplied].

The suggestion that, in essence, only those who demonstrably will not derive any benefit (in the colloquial sense of the word)[23] from YCA sentencing may be sentenced under other applicable provisions wholly overlooks the meaning of the critical word "may", as shown by the rest of the statute and by the results of the *Coefield-Kaylor* reading of the statute. Under the *Coefield-Kaylor* view of Section 5010(d), all youth offenders must receive YCA sentences unless they are clearly not amenable to rehabilitation, in which case the judge may choose between YCA and other sentencing. This reading creates an absurd result—that the trial judge is given discretion whether or not to impose YCA sentencing only with respect to those offenders who he has already determined could not "benefit" therefrom. The word "may" in Section 5010

[23] The reference to "benefit" in Section 5010(d) (and in Section 5010(c)), was, we submit, plainly intended by Congress to mean, not simply benefit in some general sense, but rather correction of antisocial tendencies and rehabilitation into a "useful citizen." See p. 23, *supra*.

(d) becomes meaningful only if the district judge is afforded discretion in selecting a sentencing mode for offenders who might benefit from YCA sentencing, whereas, in order for the statutory language to support the *Coefield-Kaylor* interpretation, "may" would have to be replaced with "shall."

Indeed, the entire *Coefield-Kaylor* premise that Section 5010 mandates selection of particular sentencing modes for particular offenders, depending solely upon their predicted amenability to rehabilitation, is belied by the constant reiteration of the word "may" in every subsection of that provision. Thus, a judge *"may"* put a youth offender on probation under 5010(a); *"may"* sentence the offender to treatment for up to six years under 5010(b); *"may"* sentence him for treatment for a longer period under 5010(c) where the maximum sentence for the offense exceeds six years; and *"may"* sentence in accordance with other applicable penalty provisions under 5010 (d). In addition, under 5010(e), for assistance in making such determinations, the judge *"may"* order the offender committed for study if he *"desires"* additional information. If subsection (d) is read as a mandatory provision requiring use of subsection (b) or (c) for certain offenders, why do subsections (b) and (c), by their language, make the selection of YCA sentencing wholly discretionary? The *Coefield-Kaylor* reading of (d) forces it into flat contradiction with (b) and (c).

We recognize, as the Second Circuit pointed out in *Kaylor* (slip op. at 5710), that the language of Section 5010(d) would more clearly reflect what we have

argued to be the congressional intent and the meaning of the statute if it did not utilize the seemingly restrictive phrase "will not derive benefit" (although the affirmative locution suggested in *Kaylor* would make the provision redundant in light of Section 5010(b)). By the same token, the *Coefield-Kaylor* analysis would rest on firmer ground had Section 5010(d) provided for use of other applicable penalty provisions "*only* if the court shall find" no benefit. In sum, the statute is not so clearly worded in support of either view as to preclude resort to the legislative history and adoption of a construction consonant with the congressional purpose.

Overall, both the structure of Section 5010 and its history suggest that Congress was there seeking merely to describe the four special dispositional possibilities available in sentencing youth offenders, any one of which the judge "may" select, with broad guidelines set forth to aid the judge in the exercise of his discretion, and that Congress was not establishing mandatory dispositional requirements for various categories of offenders. It is doubtless for that reason that Congress in no instance used the word "shall" in setting forth the type of disposition appropriate for offenders with varying degrees of rehabilitational promise.[24]

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[24] The courts in *Waters* (437 F. 2d at 723–724, n. 7) and *Kaylor* (slip op. at 5711) have relied heavily upon differences in language between the YCA and a provision adopted eight years later which authorized YCA sentencing for so-called "young adult offenders," *i.e.*, those between 22 and 26. 18 U.S.C. 4209. The language and history of that enactment however, are not compelling evidence of congressional intention in passing

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2. *The Coefield-Kaylor Approach May Deprive District Courts of Valuable Flexibility in Sentencing Decisions.*—The *Coefield-Kaylor* approach to the YCA is also vulnerable with respect to its implicit premises regarding the desirability of YCA treatment for youth offenders. In regarding YCA as giving a youth offender a "presumptive right" to treatment under the Act, the courts have apparently assumed that such treatment for up to six years (or longer under Section 5010(c)) will always be preferable to the offender than would sentencing under other applicable penalty provisions. That such an assumption is plainly unwarranted is demonstrated by the numerous cases in which youth offenders have sought to avoid such treatment.[25]

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the YCA in 1950. See *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 199–200. The young adult offender provision constitutes no more than an authorization of a new sentencing alternative and a general guideline, to be considered by district courts in the exercise of their broad sentencing discretion, reflecting the Congressional expectation that relatively fewer young adult offenders than youth offenders would be suitable candidates for rehabilitative treatment under the Act.

[25] *E.g.*, *United States* v. *Winer*, 459 F. 2d 975 (C.A. 5); *Harvin* v. *United States*, 445 F. 2d 675 (C.A.D.C.), certiorari denied, 404 U.S. 943; *Rogers* v. *United States*, 326 F. 2d 56 (C.A. 10). In many cases, both the actual sentence imposed and the maximum sentence will be less than the period of possible confinement as a youth offender. In the instant case, for example, petitioner was sentenced to ninety days' confinement and two years' probation, and was subject to a maximum sentence of one year (see 21 U.S.C. 844(a)), which could not without his consent be served in a penitentiary (18 U.S.C. 4083), whereas he might have been exposed to up to six years' confinement under the Act. Indeed, petitioner sought to have his guilty plea set aside on the ground, *inter alia*, that he had

The net result of the *Coefield-Kaylor* approach, moreover, is to limit unduly the traditionally broad discretion of sentencing judges. By straitjacketing judges in the exercise of their normal sentencing discretion, *Coefield* and *Kaylor* may disserve in several respects those offenders who are good candidates for rehabilitation. As the Act itself recognizes (18 U.S.C. 5012), prospects for rehabilitation depends greatly on the availability of adequate facilities to provide the type of treatment a particular offender needs for the period of time required to accomplish his rehabilitation. Yet, if the vast majority of offenders must now be committed for treatment, the result, particularly in a jurisdiction like the District of Columbia, is likely to be overcrowding of facilities, commingling of those likely to be rehabilitated with relatively hard-core criminals, and premature release of offenders before their treatment has had an opportunity to be effective.[26]

In addition, if any youth offender who might derive some benefit from YCA treatment must be committed

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not been informed of the possibility of commitment for up to six years under the YCA (A. 17–18).

In *United States* v. *Winer*, *supra*, a youth offender convicted of the same offense as petitioner contended unsuccessfully that the trial court committed a gross abuse of discretion in sentencing him for treatment under Section 5010(b).

[26] The United States District Court for the District of Columbia has ordered the opening of a new youth corrections center for the District for defendants sentenced under the Act, reflecting the court's concern that, due to overcrowding, youth offenders sentenced for such crimes as homicide, rape and robbery were, in 1971, serving on the average no more than ten months before parole, compared to thirty-two months in 1967. *United States* v. *Alsbrook*, 336 F. Supp. 973, 977 (D.D.C.).

for such treatment many offenders who would benefit from YCA treatment, but who the judge believes would derive more benefit from different sentencing, would be denied the benefit of such other disposition. For example, the *Coefield-Kaylor* approach, in requiring a court to sentence a youth offender to probation or treatment under the Act unless he is incorrigible, might preclude the court from extending to an offender in petitioner's position the advantages of a special probation provision that would appear to be more desirable from the offender's standpoint than any of the alternatives available under the YCA, simply because the offender was not incorrigible or might be able to derive some benefit from YCA treatment.[27]

Similarly, the judge may conclude that, while an offender might "derive benefit" from indeterminate commitment for treatment under the YCA, the needs of justice and the interests of the offender are best served by imposing a split sentence involving a short

[27] Thus, upon convicting a defendant under 21 U.S.C. 844 (which petitioner was convicted of violating), the court is authorized to place a first time offender on probation for up to one year and, without entering a judgment of conviction, to defer further proceedings. If the defendant does not violate any of the terms of his probation, he is entitled, upon expiration of the period of probation, to be discharged and to have the proceedings dismissed, without court adjudication of guilt, such discharge or dismissal not to be deemed a conviction for any purpose. 21 U.S.C. 844(b)(1). Moreover, if the defendant was not over 21 at the time of the offense, he is entitled, upon such dismissal and discharge, to an order completely expunging the prior proceedings. 21 U.S.C. 844(b)(2). The one-year limit on probation and the mandatory expungement and related procedural protections make probation under Section 844 more desirable even than YCA probation.

period of confinement (*e.g.*, a few weeks or months) followed by probation (see 18 U.S.C. 3651), without subjecting the offender to the risk of commitment for up to six years.[28] This is essentially what was done in the instant case, but it could not be done under the YCA because the judge has no control over the timing of release—a difficulty which some judges have noted. See Frankel, *Criminal Sentences* 117–118 (1972).

Finally, we submit that the exclusive focus on rehabilitation reflected in the recent decisions of the District of Columbia Circuit improperly forecloses consideration of other, important sentencing objectives—a result never intended by Congress in enacting the YCA. This aspect of the issues surrounding YCA sentencing is candidly discussed in a recent opinion by Chief Judge Greene of the District of Columbia Superior Court in *United States* v. *Cambrell,* Crim. No. 33551–73.[29] Judge Greene was there called upon to sentence a 21 year old defendant who had been charged with a series of brutal crimes including murder, rape, and assault, and had pled guilty to first degree murder. Judge Greene was unable to conclude from presentence studies that the defendant was totally incorrigible, and he could not predict with assurance that exposure to concentrated treatment over an extended period of time would not produce some rehabilitative "benefit." On the other hand, it appeared at least equally likely that the defendant's

[28] For other sentencing alternatives that might be similarly, and undesirably, foreclosed by the *Coefield-Kaylor* approach, see p. 10, *supra*, n. 5.

[29] Copies of this unreported opinion are being lodged with the Clerk and served on opposing counsel.

violent antisocial tendencies would not be eliminated or materially reduced even by the best available treatment.

Judge Greene decided to impose an adult sentence on this offender. He reached this decision not because he could honestly conclude that the offender would "derive no benefit," as that expression has come to be understood under the decisions of the District of Columbia Circuit, but because he concluded that existing facilities for youth offenders are in fact unlikely to produce substantial rehabilitation during the relatively short probable period of custody even under a Section 5010(c) commitment (currently averaging less than two years even for serious offenders). Judge Greene was not prepared to countenance the probable premature release of this offender at a time when he would likely be a continuing danger to society, nor was he willing in such a case to disregard the interests of society in deterrence and punishment of wrongdoing. We seriously doubt that Congress intended by the manner of its drafting of Section 5010(d) to preclude such a result.

If the Court were to conclude that the Act imposes a mandatory preference for sentencing under Section 5010 (b) or (c) for all youth offenders who might derive some benefit from YCA treatment, then it may be appropriate to remand for resentencing in the instant case, because it seems clear that the district court did not consider itself bound by any such standard in sentencing petitioner (A. 45). In that event the Court need not reach in this case the issues concerning explicit findings, statements of reasons and

appellate review. Those issues will, however, be presented by our petition for certiorari in *Kaylor*.[30]

If, as we contend, the YCA constitutes essentially an alternative sentencing mode to be considered and applied in the traditional sentencing discretion of the trial judge, such a remand would not appear necessary, because it is undisputed here that the district court did consider the Act and determine, albeit implicitly (A. 6, 11–13, 44–45), that YCA treatment would be inappropriate in this case. In that event, it would be necessary for the Court to address the procedural questions raised by the petition, which we consider below.

B. THE ACT DOES NOT ALTER TRADITIONAL SENTENCING PROCEDURES, UNDER WHICH SENTENCES NEED NOT BE ACCOMPANIED BY EXPLICIT FINDINGS OR STATEMENTS OF REASONS AND ARE NOT SUBJECT TO APPELLATE REVIEW

The provisions of the YCA and its pertinent history reveal that Congress was concerned about providing federal judges with added authority and facilities that could be used particularly for the rehabilitation of certain offenders. Except for supplying judges with an additional discretionary tool for obtaining information about a youth offender in advance

[30] In view of the provision of 18 U.S.C. 5023(a) that nothing in the YCA shall affect the provisions of chapter 231 of Title 18, it is arguable that whatever substantive or procedural requirements might otherwise apply in the sentencing of youth offenders do not apply when the offender is sentenced, as petitioner was, to probation, or a split sentence involving probation, pursuant to 18 U.S.C. 3651, which is part of chapter 231. Cf. *Cherry* v. *United States*, 299 F. 2d 325, 326 (C.A. 9). We have not, however, relied upon this argument in the lower courts, and we do not rely upon it in this Court.

of sentencing (18 U.S.C. 5010(e)), nothing in the Act or its history evidences any intention to alter existing sentencing procedures.

That the Act was not meant to impose new procedural requirements is strongly suggested by YCA sentencing practices in the federal courts during the Act's first twenty years. Thus, it has not been the practice of federal judges over the years to make explicit findings whenever youth offenders have been sentenced under other applicable penalty provisions.[21] Cf. *United States* v. *Kaylor, supra,* slip op. at 5713, 5714. Nor has it been the routine practice of federal judges to accompany sentences to youth offenders under provisions other than the YCA with a statement of reasons for not imposing treatment under the Act. Finally, not until *Coefield* had it been held that the exercise of a judge's discretion in sentencing a youth offender under other applicable penalty provisions was subject to appellate review on the merits.[22]

In *Coefield,* as a direct consequence of its conclusion that the YCA imposes a substantive standard on sentencing judges requiring sentencing under the Act absent an affirmative finding that the defendant will

[21] See, *e.g.*, Carter & Kunzel, *Forms of Adjudication For Use in Sentencing*, 44 F.R.D. 197, 203, 213 (1968 rev.), which contains no requirement for an explicit finding when a youth offender is sentenced as an adult.

[22] In *Rogers* v. *United States*, 326 F. 2d 56 (C.A. 10), the court remanded for resentencing on the defendant's appeal because the record did not affirmatively show a "jurisdictional" fact required to authorize the sentence imposed under the YCA, *i.e.*, that the defendant was under 22 and that the offense was one for which imprisonment could be imposed. See also *United States* v. *Critchlow*, 459 F. 2d 793 (C.A. 10).

not "derive benefit" from YCA treatment, the District of Columbia Circuit held that three procedural requirements must also be satisfied: (1) It held that Section 5010(d) requires an *explicit* finding that the defendant will not derive benefit from treatment (476 F. 2d at 1156);[33] (2) it further required that such a "no benefit" finding be accompanied by a statement of reasons (*id.* at 1157);[34] and (3) it concluded that such reasons are subject to appellate review to determine whether the finding of "no benefit" is consistent with the purposes of the Act (*id.* at 1158–1159).[35] Accord, *United States* v. *Reed*, 476 F. 2d 1145 (C.A.D.C.). In *Kaylor*, the Second Circuit recently adopted all of the

[33] In *United States* v. *Waters*, *supra*, the court had said that Section 5010(d) requires that the sentencing judge "affirmatively find," either "explicitly or implicitly," that a youth offender will not derive benefit from treatment under Section 5010(b) or (c) before sentencing under other applicable provisions. 437 F. 2d at 724, 725. Believing that comments by the sentencing judge were inconsistent with such a finding, the court of appeals in *Waters* had been unwilling to assume that the appropriate finding was implicit in the sentencing of the defendant as an adult on his conviction for robbery and assault with a deadly weapon, and therefore remanded for resentencing. Accord, *United States* v. *Ward*, 454 F. 2d 992 (C.A.D.C.).

[34] The court said that where the district court requests additional information from the Youth Division pursuant to Section 5010(e) as to whether a youth offender will derive benefit from treatment under the Act, and then follows the Youth Division's recommendation in imposing sentence, additional reasons may, but need not, be stated. Reasons must be stated where such recommendation is not followed (*e.g.*, *United States* v. *Reed*, 476 F. 2d 1145, 1151 (C.A.D.C.)), or where information is not sought pursuant to Section 5010(e). 476 F. 2d at 1157.

[35] In *Coefield* the district court had made no explicit finding or statement of reasons before sentencing the defendant as an adult on his robbery conviction (he was already serving an

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Coefield procedural requirements, but only on a prospective basis (slip op. at 5713–5714).[36]

Thus far, only the Second Circuit has followed the District of Columbia Circuit's revolutionary interpretation of the YCA. Other appellate courts have disagreed with the requirement of an explicit finding of "no benefit" in every case where the youth offender is sentenced under other applicable penalty provisions (and, accordingly, have not required a statement of reasons in every case), although some courts have required a finding in particular cases.[37] These other

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adult sentence for a prior robbery conviction), and the court of appeals remanded for further sentencing proceedings.

In the companion case of *United States* v. *Reed*, 476 F. 2d 1145 (C.A.D.C.) (*en banc*), the court acknowledged that "[t]he Youth Corrections Act does not * * * contemplate wholesale appellate intrusion" into the sentencing process (*id.* at 1150), and said that an appellate court can be concerned only with the "rationality," in relation to the congressional objectives, of the factors identified on the record as justifying the sentencing judge's decision. *Ibid.* The results in subsequent cases, however, reveal how evanescent such a limitation on scope of review can be in practice. See, *e.g.*, pp. 56–57, *infra*.

[36] In *United States* v. *Toy*, 482 F. 2d 741, 744 (C.A.D.C.), the court held that the *Coefield* requirements of an explicit finding and a statement of reasons apply also to the determination under Section 5010(c) that a youth offender "may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction * * *." This holding seems logically compelled by the precedents in the District of Columbia Circuit.

[37] In addition to the court of appeals in the instant case, decisions holding that an explicit finding is not required include *United States* v. *Crapps* (*sub nom. United States* v. *Bamberger*), 456 F. 2d 1119, 1128–1129, n. 7 (C.A. 3); *United States* v. *Jarratt*, 471 F. 2d 226, 230 (C.A. 9), certiorari denied, 411 U.S. 969. But see *Williams* v. *United States*, 476 F. 2d 970, 972, n. 5 (C.A. 3), where a different panel, without reference to

courts, moreover, have apparently not accepted the premise of *Coefield* and *Kaylor* that the YCA imposes a preferential ordering of sentencing options for trial judges, which may be applied with only limited discretion. But see p. 28, *supra*, n. 19.

Bamberger, indicated that an explicit finding of "no benefit" should be made, but held that reasons need not be stated. In *Jarratt*, since the defendant had simply been placed on probation, it was unclear whether he had been sentenced as a youth offender or as an adult, and because the case was being remanded for resentencing for other reasons, the court of appeals directed the district court to clarify its determination by making an express finding of "no benefit" from treatment under Section 5010 (b) or (c) if the adult sentencing provisions were meant to govern. 471 F. 2d at 229.

The Fourth Circuit has also stated that the finding of Section 5010(d) may ordinarily be implied from the sentencing of a youth offender under provisions other than Section 5010 (b) or (c). *Cox* v. *United States*, 473 F. 2d 334, 337 (C.A. 4), certiorari denied, 414 U.S. 869. In that case however, the Fourth Circuit remanded for resentencing because the trial judge had specifically stated that he had not made a finding of "no benefit" before sentencing the defendant as an adult, and the court of appeals called for an explicit finding and statement of reasons on the remand. *Id.* at 337. In *United States* v. *Underwood*, No. 72-1207 (C.A. 4), decided December 18, 1973, a panel affirmed an adult sentence after a case had been remanded for a specific finding of "no benefit." The district court apparently accompanied the finding with a statement of reasons, but the court of appeals' opinion does not say that such a statement is essential.

The First Circuit has remanded for a finding under Section 5010(d) where the defendant was sentenced as an adult but the sentencing judge would have imposed youth offender treatment had he not believed that the defendant was legally ineligible for it. *United States* v. *MacDonald*, 455 F. 2d 1259 (C.A. 1), certiorari denied, 406 U.S. 962. Although the court did not hold that an explicit finding was always required, it cited *United States* v. *Waters*, *supra*, which held that the finding could be made "explicitly or implicitly." See also *United States* v. *Walker*, 469 F. 2d 1377, 1381 n. 4 (C.A. 1), where the court

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Nor have other appellate courts deemed themselves authorized to engage in substantive review of the merits of the decision of a sentencing judge not to use the Act, and such review has been explicitly rejected by the District of Columbia Court of Appeals, which now has jurisdiction over most local criminal cases in the District. See *Reed* v. *United States*, 312 A. 2d 775, 781.

1. *The Act Does Not Require the Making of Explicit "No Benefit" Findings.*—The *Coefield* and *Kaylor* holding that the "finding" referred to in Section 5010(d) must be explicit is not—and was not said to be—compelled by the language of the Act or its rele-

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rejected a claim that the sentence should be set aside because a finding under Section 5010(d) was not made.

The Fifth Circuit, faced with a claim that a finding of "no benefit" had not been made, remanded the case to the district court so that the Section 5010(d) finding could be made. *United States* v. *Schenker*, 486 F. 2d 318 (C.A. 5). The court's brief *per curiam* decision did not indicate, however, whether an explicit finding was always necessary or whether the particular facts in that case gave rise to doubts as to whether such a finding could be regarded as implicit in the defendant's sentence. In *United States* v. *Fonseca*, No. 73-2875 (C.A. 5), decided March 6, 1974, the court held that "[t]here was no error" in the trial court's failure to make an explicit finding under Section 5010(d) because the court's comments at the time of sentencing "were tantamount to a finding" that the defendant would not derive benefit from a YCA sentence. Slip op. at 1458–1459. The court added that "[w]hether the trial judge must make such findings is an open question." *Ibid.* The Fifth Circuit is presently considering Section 5010(d) in *Hoyt* v. *United States*, No. 73-2435 (C.A. 5).

The District of Columbia Court of Appeals, after initially following *Coefield* as to the need for an explicit finding and a statement of reasons, in order to avoid a split in the jurisdiction and in deference to the holdings of the federal circuit courts in

vant history. In *Coefield,* the court simply concluded that, without an explicit finding, "it cannot be said with certainty that the Act was considered and a negative finding with respect to its possible benefits was made." 476 F. 2d at 1156. In *Kaylor*, the court noted as an additional reason for requiring an express finding that reliance upon an implicit finding might lead to unmeritorious appeals. Slip op. at 5711–5712.

In fact, neither the language of the Act nor its history suggests that a judge's determination to sentence an offender under other applicable provisions requires an explicit "finding" that the offender will not derive benefit from treatment under the Act. Viewed in context and against the background of the legislative history, the language of Section 5010(d) to the effect that certain things may be done if the court "finds" specified matters, is not equivalent to a statutory command that the court make findings in the manner of an administrative agency whose actions are subject to judicial review. Even where a court or agency is required to "find" a particular matter as a prerequisite to certain action, that often means, as here, only that it "conclude" in the manner specified, and does not mean that an explicit, articulated finding is necessary.[38]

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interpreting statutes of national application (see *Reed* v. *United States*, 312 A. 2d 775, 779; *Small* v. *United States*, 304 A. 2d 641), has recently modified its position so that, in cases where the sentencing judge follows the recommendation in a Section 5010(e) report that the defendant be sentenced as an adult, an explicit finding of "no benefit" by the court is not essential. *Reed* v. *United States*, *supra*, 312 A. 2d at 779.

[38] Statutes requiring a finding as a prerequisite to important governmental action do not ordinarily require explicit findings and stated reasons (see *Citizens to Preserve Overton Park, Inc.*

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To the extent that Section 5010(d) does require a particular "finding" before the judge sentences under other applicable provisions, one may deem such a finding implicit in a sentence under such otherwise applicable provisions, relying upon the presumption of regularity that applies to actions of courts no less than to those of other government officials. See, *e.g., United States ex rel. Travis* v. *Travis,* 319 F. Supp. 380, 381 (S.D. W. Va.); cf. *United States* v. *Chemical Foundation, Inc.,* 272 U.S. 1, 14–15. It is especially appropriate to rely upon an implied finding in cases where, as here, an experienced trial judge was specifically referred to the Act, either by counsel or by the presentence report, prior to pronouncing sentence.

While we thus do not believe that the Act itself requires an explicit finding under 5010(d), we recognize that there are reasons favoring some type of procedural requirement to indicate that the potential application of the YCA has been considered. We believe that such a clear, specific, and limited requirement for an express finding may properly be imposed under the power of this Court and the courts of appeals to supervise and facilitate the administra-

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v. *Volpe*, 401 U.S. 402, 409, 417) and may be satisfied by an unrecorded "mental" finding. *E.g., D.C. Federation of Civic Associations, Inc.* v. *Volpe*, 459 F. 2d 1231, 1237, 1240–1241 (C.A. D.C.), certiorari denied, 405 U.S. 1030. See also *Interpace Corp.* v. *City of Philadelphia*, 438 F. 2d 401, 404 (C.A. 3) (reference to "finding[s]" by court in Rule 23(b)(3), Fed. R. Civ. P., does not require "express, objective articulation" of required determination concerning class action); *State ex rel. Iowa Natl. Mut. Ins. Co.* v. *Florida Industrial Commission*, 151 So. 2d 636, 639 (Fla. Sup. Ct.); *School Dist. No. 7* v. *Weissenfluh*, 236 Ore. 165, 169–170, 387 P. 2d 567, 569 (*en banc*).

tion of justice in the federal courts, and we do not oppose such a result.[39] Such a requirement tends to ensure that the sentencing judge has deliberately rejected the alternative of sentencing under the YCA and also, as suggested in *Kaylor,* may remove a basis for unmeritorious appeals. While we do not oppose such a requirement, we note that some courts have suggested reasons why an explicit finding that an offender "will not derive benefit from treatment" may be undesirable.[40]

2. *The Act Does Not Permit Appellate Courts to Require a Statement of Reasons.*—The *Coefield-*

[39] We do not mean to suggest a requirement of an explicit formal "finding" in every case where an offender is sentenced under Section 5010(d), as proposed by petitioner and *Amici.* Rather, we have in mind a flexible requirement which could be satisfied by oral statements at sentencing, by recitals in the judgment, or perhaps by other means.

[40] In *Reed v. United States*, *supra*, 312 A. 2d at 779–780, n. 8, the court noted that "the giving of an adult sentence constitutes an implicit finding that the chances of successfully rehabilitating a defendant are relatively poor. For the trial judge to say so expressly while pronouncing sentence would, in all likelihood even further reduce the prospects for rehabilitation." That is to be avoided because "rehabilitation is a continuing goal of all correctional institutions; a trial judge does not turn his back on the hope or possibility of rehabilitation by giving an adult sentence." *Id.* at 781, n. 10.

See also *United States* v. *Cambrell*, *supra*, where Chief Judge Greene noted that to tie the exercise of judicial discretion over sentencing of youth offenders to an explicit "no benefit" finding might undermine the integrity and credibility of the judicial process by forcing other elements considered in sentencing to be "integrated *sub silentio* into a lack-of-benefit-to-the-defendant conclusion." Slip op. at 18. Judge Greene's dilemma would be largely alleviated by a recognition of the substantive flexibility of the "no benefit" concept, for which we argue in Part II(A), *supra.*

Kaylor requirement of a statement of reasons to support a "no benefit" finding is erroneous. It finds no support in the language of the Act or its history. In *Coefield,* stated reasons were said to be "essential to a knowledgeable administration of the Act as intended by Congress" (476 F. 2d at 1157), in order to manifest the judge's awareness of the Act's applicability and the scope of his discretion, and to show that the judge has been informed of and considered the pertinent facts concerning the defendant and has related them to the applicable law. *Id.* at 1157–1158. In *Kaylor,* the court agreed with this rationale and added that a statement of reasons is required to enable the court of appeals to review the sentencing judge's action. Slip op. at 5714–5716.[41]

Not only do the language of the YCA and its legislative history not require any such statement of reasons, that history—particularly the original proposal in 1943—strongly indicates the YCA was not intended to embody any such requirement. See pp. 25–26, *supra.* Certainly, a mandatory statement of reasons would have been contrary to the well-established practice at the time of enactment of the YCA under which federal judges were not normally required to state rea-

[41] Neither court considered, however, the possibility that, if such a statement of reasons was "essential," it would have been required by Congress, as it has done elsewhere (see p. 51, *infra*) and as it considered in connection with an aspect of adult sentencing provisions in the 1943 predecessor to the YCA (see pp. 25–26, *supra*); nor did they recognize that such reasons would not be "essential" if, as we believe, it was Congress' intention merely to provide an additional sentencing alternative to be used in the judge's discretion, the exercise of which was not to be subject to appellate review.

sons for their sentences,[42] just as they are not routinely required to state reasons for many other determinations and findings [43]—such a novel requirement would almost certainly not have been imposed *sub silentio*. To the contrary, when Congress has intended to require a statement of reasons for a sentence, it has done so explicitly. Thus, in provisions for the sentencing of dangerous special offenders (18 U.S.C. 3575–3576) and dangerous special narcotics offenders (21 U.S.C. 849), Congress has expressly provided in meticulous detail for findings and reasons for such sentences (and for appellate review thereof).

There are, moreover, substantial policy reasons, relating to the unique nature of the sentencing process, which weigh against a requirement of a statement of reasons by the sentencing judge. The sentencing process is not simply a matter of ascertaining certain objectively demonstrable facts. Rather, sentences "turn on a discretionary assessment of a multiplicity of imponderables entailing primarily what a man is and what he may become rather than simply what he has done." Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process,* 45 Minn. L. Rev.

[42] Several months before the 81st Congress began its consideration of the YCA, this Court reaffirmed in broad terms the traditional flexibility and discretion of sentencing judges. See *Williams* v. *New York*, 337 U.S. 241.

[43] Courts need not ordinarily state reasons for their decisions, unless specifically required to do so by statute or rule. See Rule 52(a), Fed. R. Civ. P., which provides, with specified exceptions, that findings of fact on decisions of motions are unnecessary. See also *Taylor* v. *McKeithen*, 407 U.S. 191, 194, n. 4; *id.* at 195–196 (Rehnquist, J., dissenting). See also *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 917–918 (Frankfurter, J.) (discussing this Court's practice of exercising its certiorari jurisdiction without a statement of reasons).

803, 812–813 (1961). See also *Williams* v. *New York, supra,* 337 U.S. at 248–249, n. 13. Sentencing is a "predictive and discretionary" function. Cf. *Morrissey* v. *Brewer,* 408 U.S. 471, 480. For these reasons, a sentencing judge has always been empowered to exercise wide discretion regarding the sources and types of information he may utilize to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by law. *Williams* v. *New York, supra,* 337 U.S. at 246. See also Rule 32, Fed. R. Crim. P."

" Recognizing the need of a sentencing judge to consider factors not otherwise admissible, this Court said in *Williams* v. *New York, supra,* 337 U.S. at 247, 250:

"A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

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"We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues."

See also *Williams* v. *Oklahoma,* 358 U.S. 576, 585.

Another reason for not requiring articulation of the factors and reasons underlying a sentence was explained by the President's Commission on Law Enforcement and Administration of Justice in the Commission's report, *The Challenge of Crime in a Free Society* (1967):

> In many cases information clearly could be disclosed without substantial likelihood of harm; yet there can be circumstances in which the particularly confidential nature of the source of the information may preclude its disclosure, or in which disclosure of a statement would be harmful to rehabilitation. Presentence reports sometimes rely upon the records of social, welfare, and juvenile agencies that are required to keep their records confidential; such agencies might stop providing information if disclosure were compelled. In other cases the person who provided certain information might be easily identified by the offender and, if the information is unfavorable, that person might be endangered. * * * [*Id.* at 144.][45]

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[45] Other reasons for not requiring a statement of reasons are indicated by the comments of District Judge Stanley A. Weigel, in testifying in opposition to a provision of a bill that would have required judges generally to state their reasons for sentences imposed:

"Most judges do state their reasons during the sentencing procedure. To require a statement of reasons would, in at least some cases, I fear, focus concern on making a record rather than on matters of more solid substance. Finally, it seems to me that often plausible reasons can be adduced to support wrong action and that, conversely, right action can be muddied by or questioned on the basis of adducing infelicitous reasons in its support.

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(Continued)

3. *Requirements of Express Findings and Statements of Reasons Cannot Be Justified as Necessary for Facilitation of Appellate Review.*"—Appellate review of youth offender sentencing was based, in *Coefield*, not on any provision of the Act or its history, but on the court's conclusion that review is permissible "to determine whether the sentencing process has conformed with the standards set forth" by the decisions of the court. 476 F. 2d at 1158. *Kaylor* adopted the same conclusion. Slip op. at 5717. Once

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(Continued)

"It tends to turn the emphasis from what is done to rationalizing why it is done. And I think it may impede, gentlemen, another important thing in the whole process of sentencing.

"Every Federal judge that I know really studies hard and long on the matter of what the sentence shall be for the individual before him and just how it shall be imposed.

"Sometimes the therapeutic effect that the judge, based upon his knowledge of the defendant, intends that the sentence shall have may be destroyed if a reason is given. Sometimes the quiet imposition of a sentence, without any talk or lecture or explanation, may be much more useful to a defendant in terms of possible rehabilitation than a reasoning it out or a giving of reasons. Sometimes a statement of all the reasons which may underlie the judge's determination of what he thinks is the proper sentence may undermine the effect the judge intends the sentencing procedure to have." [Hearings on Appellate Review of Sentencing Before the Subcommittee on Improvements in the Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., at pp. 78–79.]

" The question of appellate review of the correctness of the court's decision to sentence petitioner under applicable penalty provisions other than the YCA has not been raised by the petition and is not directly before the Court in this case. That issue, however, is closely related to the questions which are raised as to the need for explicit findings and a statement of

again, neither court considered the likelihood that if, contrary to long-standing tradition,[47] Congress had intended sentencing of youth offenders to be reviewable, it would have so provided, as it has done in other circumstances. See p. 51, *supra*. Moreover, as appellate

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reasons, in that the argument in favor of such findings and reasons is obviously stronger if there is to be appellate review of the sentencing determination as authorized by *Coefield* and *Kaylor*. But see *United States* v. *Velazquez*, 482 F. 2d 139, 142 (C.A. 2), encouraging district courts voluntarily to state reasons for sentences even though the sentence is not subject to appellate review.

It should be emphasized, moreover, that in discussing appellate review we are referring to review of the correctness of the district court's determination (for example, that a youth offender will not derive benefit from YCA treatment). The narrow scope of review available to challenge on appeal the legal sufficiency and procedural adequacy of imposition of adult sentences (see, *e.g.*, *United States* v. *Tucker*, 404 U.S. 443) is equally available to youth offenders. For example, an appellate court may require resentencing if it should appear that the district court had utterly failed to exercise its discretion in imposing sentence in a particular case by following a mechanical policy of sentencing all defendants convicted of certain offenses to the maximum possible sentence, regardless of individual circumstances. See, *e.g.*, *United States* v. *Hartford, et al.*, No. 73–1704 (C.A. 5), decided February 15, 1974.

[47] When the YCA was enacted, it was well-established that there was no appellate review of sentencing in the federal system. Thus, it was observed shortly after the Act was passed, that some "sixty years of undeviating federal precedents" established that appellate courts could not review sentencing determinations where the sentence was within the limits specified by law for the offense for which the defendant was convicted. *United States* v. *Rosenberg*, 195 F. 2d 583, 604, certiorari denied, 344 U.S. 838; see also *United States* v. *Tucker*, *supra*, 401 U.S. at 446; *Gore* v. *United States*, 357 U.S. 386, 393.

judges have acknowledged, the usual function of judicial review is not readily transferable to the type of discretionary, predictive judgment involved in sentencing.[48]

In practice, the scope of appellate review of sentencing under *Coefield* has been extensive (*e.g.*, *United States* v. *Phillips, supra;*[49] *United States* v. *Tillman,* No. 71–1352 (C.A.D.C.), decided June 6, 1973, vacated and rehearing *en banc* granted, August 10, 1973;[50]

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[48] Thus, one appellate judge has candidly admitted that "[a]s an appellate judge I have had no special expertise in sentencing. As a matter of fact I have never faced personally the frustrations of sentencing a convicted defendant. In that sense any suggestions I would have would be akin to those of a spinster on child bearing." Bazelon, *Opening Remarks, Institute on Sentencing*, 54 F.R.D. 285, 287 (1968).

[49] In *Phillips* the court reversed a youth offender's sentence as an adult upon conviction for robbery, which had been recommended by a Section 5010(e) report, and remanded for resentencing, because the panel disagreed that some factors referred to in the report (*e.g.*, the commission of another crime while on Youth Act probation) indicated that the defendant would not benefit from treatment under the Act. The panel held that there must be an explicit finding of "no benefit" by the court even when it follows the recommendation of a Section 5010(e) report.

[50] In *Tillman* a youth offender's sentence as an adult upon conviction for first degree murder was set aside and remanded for reconsideration because the panel majority disagreed with some of the reasons referred to in the Section 5010(e) report followed by the sentencing judge (*e.g.*, the defendant's "assaultive" personality, long criminal record, and failure to respond to juvenile court treatment for prior offenses). The factors cited in the report were held to be insufficient to overcome the defendant's "presumptive right" to treatment under Section 5010(b) or (c). Slip op. at 20.

United States v. *Riley*, 481 F. 2d 1127 (C.A.D.C.))[51] with the result that the court of appeals seems ultimately to be in fact substituting its judgment for that of the sentencing judge. Indeed, as Chief Judge Reilly recently observed in *Reed* v. *United States, supra*, in holding that "nothing in either the Act or its legislative history * * * indicates that such discretionary action is a matter for appellate review" (312 A. 2d at 781):

> [T]he net effect of the *Phillips*, *Riley*, and *Tillman* holdings is to prevent such judge from ever exercising his authority not to commit for youth correction treatment unless he or the authors of the advisory report set forth reasons which an appellate court finds acceptable [*id.* at 780].

In sum, the Youth Corrections Act does not impose the procedural requirements of the Administrative Procedure Act on sentencing judges. The elaborate structure of findings statements of reasons, and appellate review in connection with the sentencing of youth offenders amounts, in the final analysis, to judicial legislation to achieve results which may well be desirable but were plainly not intended by Congress when it enacted the YCA in 1950.

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[51] In *Riley*, a divided panel reversed a youth offender's sentence as an adult upon conviction for armed robbery, because the panel majority disagreed with the reasons stated in the Section 5010(e) report relied upon by the sentencing judge (including overcrowding of Youth Center facilities, and a pattern of "aggressive" robbery type offenses). See also *United States* v. *Forrest*, 482 F. 2d 777 (C.A.D.C.) (reasons stated by judge held insufficient.)

III. CONSTITUTIONAL CONSIDERATIONS DO NOT REQUIRE THAT SECTION 5010(D) BE CONSTRUED AS IT HAS BEEN IN COEFIELD AND KAYLOR

Although the question presented in the petition was solely one of statutory construction,[52] and no constitutional question was raised,[53] petitioner now (Br. 10–15) seems to suggest that the decision of the court below is vulnerable under the Fifth Amendment. Under the circumstances, however, that issue is not properly before the Court. See, *e.g., Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 37, n. 35; *Irvine* v. *California,* 347 U.S. 128, 129–130; *Phillips Co.* v. *Dumas School Dist.,* 361 U.S. 376, 386, n. 12. The contention is in any event, without merit.

No court has held that explicit findings, a statement of reasons, or appellate review is required with respect to Section 5010(d) as a matter of due process of law; nor have the courts considered themselves obliged to construe Section 5010(d) in any particular manner to avoid constitutional issues. All of the decisions at variance with the decision below have rested on a purported construction of the Act itself, in light of its purposes and legislative history.

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[52] The "question presented" was said to be: "Does the Federal Youth Corrections Act compel sentencing courts to state reasons on the record why a youth offender would not receive benefit from treatment under the Act before sentencing the youth offender pursuant to the Adult Criminal Code" (Pet. 2).

[53] Indeed, no constitutional provision was even cited, in accordance with Rule 23(1)(d) of the Rules of this Court, as being involved in the case (Pet. 2).

This Court has held that due process does not require a sentencing judge to divulge the reasons for the sentence he imposes or require appellate review of the exercise of the discretionary power vested in him to fix sentences. *Williams* v. *Oklahoma, supra; Williams* v. *New York, supra; Blockburger* v. *United States,* 284 U.S. 299, 305; *Kawakita* v. *United States,* 190 F. 2d 506 (C.A. 9), affirmed, 343 U.S. 717, 745; see *Townsend* v. *Burke,* 334 U.S. 736, 741. Nor does it violate due process to vest in trial judges the discretionary authority to determine whether an offender should be rehabilitated through treatment particularly stressing that objective or sentenced under the penalty provisions otherwise applicable to his offense. See *Marshall* v. *United States,* No. 72–5881, decided January 9, 1974.[54]

In an effort to avoid the thrust of these decisions, petitioner's suggestion of a constitutional issue begins

[54] In *Marshall*, this Court said that "it would have been a permissible choice for Congress to permit discretionary inclusion in * * * [narcotic addict rehabilitation] programs of those whose prior offenses were determined to be addiction-related or motivated. Such a discretion might appropriately have been vested in the trial judge much in the manner in which he is now required to exercise his discretion under § 4252 in determining whether the defendant is an addict who is likely to be rehabilitated through treatment." Slip op. at 10. See also *United States* v. *Lee*, 478 F. 2d 1400 (C.A. 4), certiorari denied *per curiam*, No. 73–5256, November 19, 1973, in which the Fourth Circuit affirmed a trial judge's refusal to sentence an offender guilty of violating 21 U.S.C. 841(a)(1) to narcotic addict rehabilitation treatment under 18 U.S.C. 4251 *et seq.*, instead sentencing him to the penalty provisions otherwise applicable. Accord, *Hart* v. *United States*, No. 73–3139 (C.A. 5), decided January 28, 1974.

with the premise that every youth offender has a "valuable right" to be treated in accordance with the Act (Br. 10–11), and then contends that that right cannot be "destroyed" through sentencing as an adult without an articulation by the court of findings and reasons for the adult sentence.

As we have shown, however, even if we accept, *arguendo,* petitioner's debatable assumption that a defendant will always prefer to be sentenced as a youth offender than otherwise, neither the Act nor its legislative history supports the claim that a defendant has a "right" to such treatment. That is merely one of the options available in the exercise of the court's traditional discretion in sentencing.

However it is termed, a youth offender's expectation of possible treatment under the Act, in lieu of an adult sentence or other applicable penalty, is not such an interest that the demands of due process impose procedural requirements, not normally applicable to sentencing, upon the sentencing of youth offenders.

Kent v. *United States,* 383 U.S. 541, on which petitioner relies, is not to the contrary. There, this Court construed a different statute involving fundamentally different consequences. In that case the defendant—prior to trial or conviction—was entitled *prima facie* to treatment as a juvenile, and the exceptional provision for waiver by the juvenile court of its jurisdiction had substantial effects not only on possible treatment but also upon a whole array of important constitutional and other procedural rights concerning the

trial.[55] The determination to sentence a convicted youth offender as an adult does not involve a deprivation of rights comparable to the waiver of jurisdiction in *Kent*.[56]

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[55] That *Kent* rested upon construction of a particular statute, and not on constitutional grounds, is indicated by the decision in *Cox* v. *United States*, *supra*, where the court of appeals upheld the constitutionality of the provision of the Federal Juvenile Delinquency Act (18 U.S.C. 5032) giving the Attorney General unreviewable discretion to direct, without hearings, findings or reasons, that a juvenile be proceeded against as an adult rather than as a juvenile—a decision comparable in consequences to the court's waiver involved in *Kent*. See also *United States* v. *Verra*, 203 F. Supp. 87, 91 (S.D. N.Y.).

[56] Unlike a parolee, who has merely been *accused* of violation of the terms of parole, petitioner, having been *convicted* of a criminal offense, had no presumptive right to continued liberty. Compare *Morrissey* v. *Brewer*, 408 U.S. 471. If any analogy to parole is appropriate, petitioner is like a prisoner seeking release on parole. The prisoner enjoys no presently existing right to liberty, and the decision to allow release turns not on retrospective findings of fact so much as on, among other predictions, an assessment of the benefit the parole applicant and society will derive from his release. Due process requirements of findings and reviewable reasons have been held inapplicable to such discretionary judgments regarding the terms of incarceration. *E.g., Farries* v. *United States*, 484 F. 2d 948, 949 (C.A. 7); *Scarpa* v. *U.S. Board of Parole*, 477 F. 2d 278, 282–283 (C.A. 5) (*en banc*), certiorari granted and remanded for a determination of mootness, 414 U.S. 809, subsequently vacated as moot; *Menechino* v. *Oswald*, 430 F. 2d 403 (C.A. 2), certiorari denied, 400 U.S. 1023. Nor is this case comparable to *North Carolina* v. *Pearce*, 395 U.S. 711, involving the right not to have a heavier sentence imposed for having pursued an appeal. See also *Goldberg* v. *Kelly*, 397 U.S. 254, 262, dealing with possible loss of "a matter of statutory entitlement."

Petitioner's reliance upon *Specht* v. *Patterson*, 386 U.S. 605, is also misplaced. The sentencing of a youth offender does not entail an independent supplementary criminal proceeding comparable to that involved in *Specht*.[57] The necessary consideration of potential benefit from treatment under the Act is but one aspect of the appraisal of an offender's potential for rehabilitation that is part of the sentencing judge's exercise of discretion in any case, whether the choice is limited to various periods of imprisonment, or includes probation, suspension of sentence, or other dispositions.

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[57] In *Specht*, the Court held that due process required a full evidentiary hearing and reviewable reasons before a person convicted of a specified sex offense (having a maximum sentence of ten years) could be subjected to a special sentence of from one day to life, which could be imposed only if the sentencing court was of the opinion that the person "if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." Colo. Rev. Stat. § 39–19–1; see 386 U.S. at 607. That provision did not make "the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person actually constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact * * * that was not an ingredient of the offense charged." *Id.* at 608. The Court specifically reaffirmed its decision in *Williams* v. *New York*, *supra*, where it held that the due process clause did not impose procedural requirements on a sentencing judge, but found the sentencing process in *Specht* to present a "radically different situation." 386 U.S. at 606, 608.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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